No. 3752

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OZMO OIL REFINING COMPANY (a corporation), and PETROLEUM PRODUCTS COMPANY (a corporation),

Plaintiffs in Error,

vs.

COTTON & COMPANY, Incorporated,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Statement.

This is an action by Cotton & Company, a New York corporation, against the Ozmo Oil Refining Company and the Petroleum Products Company, California corporations, for damages for breach of a contract to sell 700 tons of white semi-refined wax, commonly known as match wax. The wax was to be similar to sample submitted, the price was 9¼ cents per pound. No wax was ever delivered.

Prior to the execution of the contract, Cotton & Company had sold the wax to the Standard Oil

Company and Mitsui & Company, at a profit; and, upon the trial below, Cotton & Company recovered a judgment for the amount of the profits which they would have made from such re-sale. No exceptions to the findings are to be found in the bill of exceptions. Certain assignments of error appear in the Transcript.

Facts.

Cotton & Company, in August, 1918, entered into negotiations to purchase from Ozmo Oil Refining Company 700 tons of paraffine wax. On August 29th, 1918, Rutger, Bleeker & Company, brokers in New York City, wrote a letter to Cotton & Company, confirming the sale to them of 700 tons of paraffine wax at 9¼ cents a pound, and enclosed a duplicate letter asking Cotton & Company to sign it (Trans. p. 42). Cotton & Company, on August 31st, confirmed the sale in a letter of that date to Rutger, Bleeker & Company, in which they made certain suggested changes in the packing, weights and specifications (Trans. p. 43). Rutger, Bleeker & Company stated that official contracts were being forwarded to San Francisco; and Cotton & Company said they would await those contracts. The contracts, dated September 5th, 1918, were then drawn up, but were not received by Cotton & Company in their final form until October 14th, 1918. This was due to the fact that several changes had been made in the contracts.

The contracts as finally agreed upon did not agree with the brokers' agreement contained in the letters of August 29th and 31st, before referred to. It varied from the brokers' letters in several material particulars which will be pointed out later. It called for a sale by sample, different terms of payment, introduced damage clauses, changed the method of packing, fixed the moisture content, made it subject to government control, etc.

On September 30th, 1918, Cotton & Company sold 600 tons of this wax to the Standard Oil Company for 10⅛ cents a pound, and on October 1st the remaining 100 tons to Mitsui & Company at 10½ cents per pound, an advance of ⅞ cents per pound and 1¼ cents per pound respectively. For which profits defendant in error recovered damages below. Ozmo was notified by Leon, the sales manager of Cotton & Company, at the time of the brokers' sale and before the execution of contract that the wax had been sold by Cotton & Company (Trans. p. 58). And Cotton & Company, on September 17th, 1918, notified Ozmo that it would offer the material for sale (Trans. p. 69). And on September 30th wired that it had sold to responsible buyers (Trans. p. 49). And on October 3rd wrote that it had been resold (Trans. p. 72), and on October 8th wrote that it had been sold to the Standard Oil Company and Mitsui & Company (Trans. p. 73). And the Court below found that, prior to the execution of the contract, Cotton had informed Ozmo that it was about to purchase said wax for resale

and had sold the same (Trans. pp. 20-21). No wax was ever delivered under the contract (Trans. p. 20). Wax had fallen in price after the making of the contract; but Cotton did not purchase to fill its contracts because Ozmo was insisting that it could and would furnish the wax (Trans. p. 40).

Law.

Point I.

THE LETTER OF COTTON & COMPANY, DATED AUGUST 31ST, 1918, ANSWERING THE LETTER OF RUTGER, BLEEKER & COMPANY OF AUGUST 29TH, DID NOT CONSTITUTE THE CONTRACT BETWEEN COTTON & COMPANY AND THE OZMO COMPANY.

(a) The letter of August 31st was not an unqualified acceptance. It differed from the offer in three particulars:

1. The packing was different. It was offered "packed in tight barrels" (Trans. p. 42). It was accepted to be "packed in double headed barrels" (Trans. p. 43). The contract finally signed by the parties called for "packed in double headed barrels" "(oil barrels, suitable for export)" (Trans. p. 18).

2. The terms in the brokers' offer were also different. The brokers' offer called for "Pacific Coast weights" (Trans. p. 42). While the acceptance reads, "Pacific Coast gross weights less actual tares as per licensed Weigh Master's returns" (Trans.

p. 43). While the final contract omits all reference to weights (Trans. pp. 17, 18, 19).

3. The moisture content was different. The offer called for "not over 3% oil and moisture" (Trans. p. 42). While the acceptance reads, "not over 30% oil or moisture" (Trans. p. 43).

The above shows the difference between the brokers' offer and the brokers' acceptance. There are very material differences between the brokers' arrangements and the contract itself, as we will point out later.

(b) The parties intended to put their agreement in final form, and the letters referred to were only preliminary to such agreement. The letters of August 29th and August 31st referred to the fact that "an official contract is being forwarded" (Trans. pp. 111, 112).

(c) The contract itself differs materially from the agreement contained in the letters.

1. The most remarkable difference between the brokers' arrangement and the final contract is that the contract itself calls for a sale by sample. It reads, white semi-refined wax "similar to sample submitted" (Trans. p. 18). This is an entirely different contract from that proposed by the brokers. The so-called brokers' contract is an ordinary contract of sale, but the final contract of the parties is a sale by sample and an entirely different kind of a contract, involving different methods of proof. Under the brokers' contract, evidence would be

offered to show that it was white semi-refined wax; but, under the final contract, the question would be primarily whether it was like the sample submitted.

2. The terms of payment were modified in the contract. The original offer called for sight draft bill of lading attached (Trans. p. 42). The contract called for "irrevocable credit to be established in Ozmo's favor subject to demand every thirty days as wax is being shipped" (Trans. p. 18). Under the brokers' arrangement the wax might be paid for at New York, London or Yokohama, shipped on sight draft with bill of lading; but by changing the contract to irrevocable credit to be established in Ozmo's favor, Ozmo was able to get cash at San Francisco when the wax was shipped and not await the arrival of the bill of lading at the point of delivery with the possibility of the shipment being refused and the wax being thrown back on Ozmo's hands at a distant point. Under the irrevocable credit, the wax had to be accepted at San Francisco. This was a material change greatly to the advantage of Ozmo.

3. The original brokers' arrangement called for 50 tons monthly (Trans. p. 42). While the contract submitted first called for 35 to 50 tons monthly (Trans. p. 70).

4. The brokers' arrangement called for "packed in tight barrels" (Trans. p. 42). While the final contract called for "packed in double headed bar-

rels or oil barrels suitable for export'' (Trans. p. 18).

5. The final contract contains a damage clause which provides that neither party shall be liable for any damage or delays occasioned by strikes, riots, fires, insurrection, labor disturbances, inability to secure cars, or any other cause beyond seller's control. It also provides that deliveries are subject to governmental regulations, and that the buyers shall bear any additional cost in making deliveries under such regulations. It provides that the agreement shall bind the successors and assigns of the respective parties.

As we have just pointed out, the contract itself differs in the foregoing manner from the brokers' offer and acceptance, and we respectfully submit that these changes are material, and that the parties having agreed to these changes, the brokers' arrangement was no longer of any effect.

The argument of plaintiff in error is based on cases where an attempt was made by a party to back out of a contract. There is no such question here. Neither party repudiated the contract, either the formal or the informal arrangement, but they entered into a written agreement materially different from the preliminary arrangements made for the parties by the brokers. Both parties here agreed to a modified contract and acted under the modified agreement and not under the original agreement. This is particularly true with respect to the

irrevocable credit, as Ozmo refused to recognize the contract unless the irrevocable credit was established. Cotton wired Ozmo October 2nd: "Will arrange credit promptly upon receipt of signed contract" (Trans. p. 71). And on October 3rd Cotton wrote Ozmo. "We are willing to co-operate with you to the extent of a bank guarantee or a letter of credit for the amount of our purchase, but do not understand why this should be necessary as the material has all been resold to responsible houses, and *particularly in view of the fact that no mention of these terms was made in your contract which we signed*" (Trans. p. 72). Cotton signed the first draught of the contract and when it was returned to Ozmo they changed it by inserting the clause in regard to irrevocable credit (Trans. p. 78).

And in Ozmo's letter of October 10th they speak of drawing up new contracts for the purpose of inserting a clause in regard to irrevocable credit, as this was inadvertently omitted from the originally prepared contract of September 5th (Trans. p. 78).

(d) The parties themselves acted under the formal agreement and accepted that as the contract and not the preliminary arrangement of the brokers.

In particular, we have pointed out that the Ozmo people refused to go on with the transaction until the letter of credit was established. Under the letters of August 29th and 31st, Cotton would not

have been obliged to put up any money until the wax was delivered to him; but, as a matter of fact, it established a letter of credit in October, although no deliveries were ever made on the contract, and it was thereby put to considerable expense, which proved to be entirely unnecessary (Trans. p. 107).

It may be conceded at the outset that, under certain circumstances, parties can be bound by preliminary correspondence although it was agreed that a formal contract would be drawn up. As was said in

> Ridgway v. Wharton, 6 H. L. Cas. 238; 10 Reprint 1287.
>
> "I again protest against its being supposed, because persons wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that such an agreement has been made, but the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement."
>
> "Generally speaking, the circumstance that the parties did intend a subsequent agreement to be made is strong evidence that they did not intend the previous negotiations to amount to an agreement."
>
> 13 Corp. Juris, p. 292.
>
> "The fact that parties negotiating a contract contemplated that a formal agreement should be prepared and signed is some evidence that they did not intend to bind themselves until

the agreement was reduced to writing and signed."

6 R. C. L. 619;

Ann. Cas. 1912 B. 130 note.

"So where the directors of the corporation, by vote, accepted a proposition made to them by defendant, and by a separate resolution directed the treasurer to inform the defendants of the acceptance and the agreement is thereafter reduced to writing and signed by the parties, and embodies some provisions in amplification of the proposal and acceptance but not contained therein, the contract will be deemed to have been made as of the date of execution and delivery of the written agreement and not as of the date of the passage of the resolution accepting the proposition." * * * "It may be conceded that the offer and acceptance amounted to a meeting of the minds of the parties and would be sufficient to constitute a contract between them if they so understood and intended. But where parties to an arrangement of this kind show, either by express words or by their action, that they regard it as preliminary only, and to be put into final shape thereafter, and subsequently execute a formal instrument in writing, the latter is the only contract and the preliminary steps, however elaborate, go into the category of mere negotiations leading up to the final result. This is always the presumption of law where a written contract is made. * * * The written contract embodied some provisions that were not in the proposal and acceptance; these provisions, it is true, are in harmony with the prior arrangement and are merely supplementary to it, but if they had in any way been in

conflict, they must have prevailed, as the final agreement of the parties."

Keystone S. S. Co. v. Bate, 46 Atlantic 887 (Penn.).

So here the final agreement is a sale by sample, and if any conflict arose in our case, the law regarding a sale by sample would have been applied, while it could not have been applied under the so-called brokers' acceptance, as nothing was therein said about "sample"; so, if a dispute arose over the packing, the final contract would prevail. Especially is this true because the acceptance of the brokers' offer called for different packing from that mentioned in the original offer. So, too, the terms are entirely different in regard to credit. And, besides all these differences, the final contract contains a damage clause. None of which provisions were even mentioned in the brokers' offer and acceptance. The parties discarded the terms of the brokers' offer and acceptance entirely, and by their own construction adopted the terms of the formal agreement.

All of the cases cited by plaintiff in error are where a party, having come to terms with the other but not having signed a formal agreement, contended that for that reason he was not bound.

The plaintiff in error has cited the following cases on this point:

U. S. v. P. J. Carlin Constr. Co. 224 Fed. 859;

N. Y. v. Meyersvale Coal Co., 217 Fed. 747;
Whitted v. The Fairfield Cotton Mills, 210 Fed. 725;
Wehner v. Bower, 160 Fed. 240;
McConnell v. Harrell, 149 N. W. 1042;
Sanders v. Pottlitzer, 39 N. E. 75.

In U. S. v. P. J. Carlin Construction Company, the construction company submitted a bid which was accepted. A formal contract was contemplated, but the Government inserted in this contract certain provisions not contained in the bid, which the construction company refused to agree to. The contractor's bid was submitted upon condition of its acceptance within 60 days. When the contractor refused to agree to the new conditions imposed in the contract, the Government, more than 60 days after the bid had been accepted, unconditionally accepted the bid, and it was held that there was no contract.

In N. Y. v. Meyersvale Coal Company suit was brought on the theory that the terms were all contained in the correspondence although no written contract as contemplated was ever signed by the coal company.

In Wehner v. Bower, the details of the contract were agreed to and it was proposed to enter into a written contract, which was not done. The contract was held valid, nevertheless.

In McConnell v. Harrell, a correspondence was entered into covering all the points. The corre-

spondence was between the parties and not the brokers, and, while a formal agreement was proposed, none whatever was drawn up or signed. It was held that all of the terms were contained in the correspondence and that the parties were bound by it although a formal contract had not been executed.

In Sanders v. Pottlitzer the proposed contract contained new provisions that were burdensome and expensive to plaintiff, who refused to accept the new contract on account of the insertion of such provisions. But in our case the new conditions were inserted and agreed to by both parties.

In each of the cases above cited the facts were entirely different from those in our case. It was held in each of these cases that, the details of the arrangement having been set forth in correspondence, the parties were liable notwithstanding the fact that a formal contract, by them contemplated, had never been drawn up and signed. In each case one of the parties was attempting to back out of the arrangement because of the failure to sign a formal contract; but the Court held that the terms, having been fully expressed in writing and no condition had been imposed that a formal contract would have to be signed before the agreement between the parties would be considered valid, that the parties were bound although no formal contract was ever executed.

However, in our case there is no attempt on the part of either party to repudiate the contract or the brokers' offer and acceptance. In our case both parties recognized that the brokers' offer and acceptance did not express all of the conditions, and they therefore awaited the drawing of the final written agreement before considering the matter as consummated.

It is noted that the Ozmo Company refused absolutely to go ahead with the deal until the irrevocable credit had been established by Cotton & Company. This was quite a burdensome provision, as it meant that Cotton & Company had to establish banking credit at San Francisco to the total value of the contract, which was 700 tons of wax at 9¼ cents a pound, or $129,500.00. There was no such provision whatever in the brokers' offer and acceptance.

In none of the cases cited had a contract been signed. They are all cases where one party was trying to absolve himself because of the failure to sign a contract, and the facts are not at all like the facts in this case.

The parties here discarded the terms of the brokers' contract entirely and by their own construction adopted the terms of the formal agreement. Both parties here stood by the agreement, Cotton demanding deliveries (Trans. pp. 84, 92, 93), and Ozmo insisting on its ability to deliver (Trans. pp. 86, 87, 88, 94).

In 13 Corpus Juris, 289, it is stated:

> "The preliminary negotiations leading up to the execution of the contract must be distinguished from the contract itself. There is no meeting of the minds of the parties while they are merely negotiating as to the terms of the agreement to be entered into. To be final, the agreement must extend to all the terms that the parties intend to introduce, and material terms cannot be left for future settlement. Nor is there a binding contract where, although its terms have been agreed on orally, the parties have also agreed that it shall not be binding until evidenced by writing."

Dillingham v. Dahlgren, 198 Pac. 832 (Cal. App. 1921).

In Ambler v. Whipple, 87 U. S. 546; 22 Law. Ed. 403, the Court said:

> "It is very clear that both parties intended to have a written instrument signed by each as the evidence of any contract they might make on that subject, and neither considered any contract concluded until it was fully executed."

In Mercantile Trust Co. v. Sunset Oil Co., 176 Cal. 461 (1917), the Court said at page 469:

> "It is entirely clear from the evidence that all the parties contemplated that any arrangement finally made was to be evidenced in writing and that the draught submitted to and subsequently approved by the Union Oil Co. constituted the form of writing by which the end was to be accomplished. It is elementary where 'it is a part of the understanding between the parties that the terms of the contract are to be reduced to writing and signed by the parties, the assent to which terms must be evidenced in the manner

> agreed upon or it does not become a binding or completed contract.' Until the return of the papers by the Union Oil Co. the parties were still negotiating regarding the terms of the writings which were intended to ultimately embody the proposed agreement respecting the subordination of the bonds to the lease."

In our case the agreement itself was submitted and changed several times and finally agreed to and executed by both the parties.

In Las Palmas v. Garrett, 167 Cal. 397 (1914), at p. 400, the Court said:

> "There is enough in the evidence to support the conclusion in the trial Court that it was the understanding of the parties that the agreements were to be reduced to writing and were not to become binding upon either party until evidenced by a written contract or agreement. If such was the understanding, it was essential to a valid and binding contract that defendant should unequivocally consent in writing to the terms stated in the writing of January 21st, 1910."

In Spinney v. Downing, 108 Cal. 666 (1895), Van Fleet, J., said:

> "It is a general rule, to which this case presents no exception, that, when it is a part of the understanding of the parties that when the terms of the contract are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract. This is essentially true when, as here, the proposed contract contains reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other."

Talmage v. Arrowhead R. Co., 101 Cal. 367:

> "In Pacific Rolling Mill v. Railway Co., 90 Cal. 627, the Court said at p. 633: 'Besides, the letter proposed and the enclosed draft contained materially new terms of the agreement, namely the personal guarantee of Mr. Evans and J. G. North. No such guarantee had been asked for before'."

So here, Ozmo insisted upon inserting in the formal contract the provision that Cotton furnish a letter of credit (Trans. p. 78), while the original brokers' offer provided merely for a sight draft with a bill of lading attached (Trans. p. 42); a material change in the terms of payment.

In Los Angeles Cooperative Association v. Phillips, 56 Cal. 539, a memorandum of items of an agreement *as a basis* upon which to conclude a contract was held not to be sufficient to be treated as a concluded contract.

Fuller v. Reed, 38 Cal. 99.

The intention of the parties is to be deduced by the language employed by them—the question being not what intention existed in the minds of the parties, but the intention expressed by the language used.

13 Corpus Juris, 524.

The final agreement was a sale by sample, while the brokers' offer and acceptance was not.

> "Care should be taken not to construe as an agreement letters which the parties intended only as preliminary negotiations."

Lyman v. Robinson, 14 Allen 254 (Mass.).

It is quite clear that the arrangement made with the brokers was preliminary, because:

1. The acceptance was not unqualified.

2. The intention was to execute a formal contract.

3. The formal contract was executed by both the parties and contained clauses materially different from the original offer, in that the contract called for a sale by sample, and introduced new arrangements in regard to payment, damage clauses and governmental regulations.

4. The formal agreement was adopted by the parties as the contract and they acted under that and not under the original offer.

5. The contract itself was never repudiated by either party.

6. The Court below found, and there was evidence to support it as the finding, that the formal agreement and not the original offer was the agreement by the parties; and there is no exception in the record to such finding.

Point II.

NOTICE OF RESALE WAS GIVEN BY COTTON & CO. TO THE OZMO CO. PRIOR TO THE EXECUTION OF THE CONTRACT MADE OCTOBER 14, 1918, AND DEFENDANT IN ERROR WAS ENTITLED TO THE PROFITS IT WOULD HAVE MADE ON THE RESALE OF THE WAX TO THE STANDARD OIL CO. AND MITSUI & CO.

The contract called for 700 tons of wax at 9¼ cents a pound (Trans. p. 18). It was made on Octo-

ber 14, 1918. 600 tons of the same wax was sold by Cotton & Co. on September 30, 1918, to the Standard Oil Co. at 10⅛¢ an advance of ⅞¢ a pound. 100 tons was sold October 1, 1918, to Mitsui & Co. at 10½¢ a pound, an advance of 1¼¢ a pound (Trans. p. 20). Defendant in error pleaded such special damages (Trans. p. 6) and recovered the same below. No exception to the Court's finding is found in the bill of exceptions.

The evidence of notice of resale given by Cotton to Ozmo is as follows: Leon, sales manager for Cotton, notified Ozmo's brokers, Rutger, Bleecker & Co. within a few days after he had made the sale to the Standard Oil Co. "within a few days" after the offer had been made and accepted by Rutger Bleecker Co.—"before any written contract was made" (Trans. p. 64). "I know that we told Rutger Bleecker & Co. that the wax had been resold" (Trans. p. 65). "I told them that before any written contracts were entered into" (Trans. p. 65). "There was some delay in receiving the contracts—I did call Rutger Bleecker and asked them if there was any way to speed up the contracts as the goods had been resold" (Trans. p. 65).

Further, Cotton on September 17, 1918, wrote Ozmo that it would offer the material for sale (Trans. p. 69); and on September 30th wired that it had been sold to responsible buyers (Trans. 49) and on October 3rd, wrote Ozmo that it had been resold (Trans. p. 72) and on October 8th wrote Ozmo that it had been sold to the Standard Oil Co.

and Mitsui (Trans. p. 73). And the contract was not made until October 14th.

> "If at the time of making the contract, the seller knows that the buyer buys the goods with the intention and for the purpose of reselling them, altho he may or may not know of any particular subcontract existing or contemplated, the inference is that the seller contracts to be liable for the increased damage which will flow from a breach of the contract under the special circumstances and applying the second part of the rule laid down in Hadley v. Baxendale those damages may be readily supposed to be within the contemplation of the parties."
>
> Benjamin on Sales, 6 Ed. 879.

In Booth v. Spuyten Dyvil Co., 60 N. Y. 487 at 494, plaintiff had resold and had so informed defendant. Plaintiff was allowed profits he would have made. The Court said:

> "But the mere fact that the vendor does not know the precise market price specified in the contract will not exonerate him entirely. It is only requisite that the parties should have such knowledge of special circumstances affecting the question of damages as that it may fairly be inferred that they contemplated a particular rule or standard for estimating them and entered into the contract upon that basis".

It is not necessary for the seller to have knowledge of the price to be received by the buyer.

> 24 R. C. L. 81;
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> Guetzkow v. Andres, 52 L. R. A. 209 (Wis).
>
> "It is well settled that, in order to satisfy the requirement of notice to the vendor that the vendee is buying for the purpose of reselling,

it is only necessary to prove such purpose of resale, and that the recovery of profits thereon was within the contemplation of the parties to the contract at the time of its execution. Expected profits may be recovered where it was fairly within the contemplation of both parties that the goods were purchased with a view to a resale for profit".

Howard v. Wells, 176 Fed. 512;

Armeny v. Madsen & Buck Co., 111 Ill. App. 621.

"All that seems to be required is that sufficient information of such special circumstances be given by the one to the other so that the latter may be put on reasonable inquiry concerning them".

Blue Grass C. Co. v. Luthy, 33 S. W. 835.

"Sufficient information of the special circumstances must be given to the seller to put him on reasonable inquiry concerning them".

Lunan v. Pa. R. R., 24 N. Y. Sup. 824.

The burden of proof that the damages by the vendee could have been prevented is on the vendor.

"The burden of proving that the damages sustained by the vendee could have been prevented or mitigated by the latter's action rest upon the vendor as the party guilty of the breach of the contract."

Howard v. Wells, 176 Fed. 512 at 516.

In Pac. Sheet Metal Wks. v. Cal. Canneries, 164 Fed. 980 (C. C. A. 9th Ct.), the Pacific Sheet Metal Works agreed to deliver cans and was delayed by

tin not arriving from England due to storms—profits that might have been made in the canning business were allowed.

Where the purchaser bought to sell again and had made a contract for resale at a profit when the seller refused to make further delivery the measure of damages is the profit that would have been made.

Kaye v. Eddystone, 250 Fed. 654.

Where defendant broke a contract to furnish motor cars to a dealer for resale tho the dealer had made contracts for the sale of more than half the cars it was to receive and could have readily disposed of the remainder, the profits on resale were so reasonably certain as to be recoverable as damages.

Northwestern Auto Co. v. Harmon, 250 Fed. 832 (9th C. C. A.).

In Messmore v. N. Y. Shot Co., 40 N. Y. 422, defendants had agreed to deliver merchandise to plaintiff with knowledge that the latter had agreed to deliver like merchandise to a purchaser and failed to perform. Held that the difference between the price plaintiff was to give and that which he was to receive was properly recoverable as damages. The Court said:

> "The rule, however, is changed when the vendor knows that the purchaser has an existing contract for resale at an advanced price and that the purchase is made to fulfill such contract and the vendor agrees to supply the

> article to enable him to fulfill the same, because the profits which would accrue to the purchaser upon the fulfilling of the contract of resale may justly be said to have entered into the contemplation of the parties in making the contract".

In Lapp v. Ill. Watch Co., 104 Ill. App. 255, plaintiff showed that at the time he contracted with defendant for goods he had orders for sale of same, and if goods had been delivered as agreed he would have made a profit on such goods or orders. Plaintiff was allowed such profits.

> "If the seller knows that the purchaser has existing contracts for resale and the contract is made in contemplation of such resale, the buyer may recover as damages the profits he loses by reason of the breach".
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> 35 Cyc. 645;
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> Hubbard v. Rowell, 51 Conn. 423;
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> Van Arsdale v. Rundel, 82 Ill. 63;
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> Wolders v. Veltman, 83 S. W. 224 (Texas);
>
> Anderson v. Kleburne, 27 S. W. 504 (Tex.).

Contract for harrows made with reference to season's trade—lost profits allowed:

> Harrow Spg. Co. v. Whipple, 30 Am. St. Rep. 421 (Mich.);
>
> Ellis v. Miller, 58 N. E. 516 (N. Y.);
>
> Imperial Coal Co. v. Port Royal C. Co., 138 Pa. St. 45;
>
> Jordan v. Patterson, 35 Atl. 521 (Conn.);
>
> Borries v. Hutchinson, 114 E. C. L. 443.

Where defendant contracted to furnish fire extinguishers and refused to fulfill, he was held liable for profits on the machines actually sold.

Kenney v. Knight, 127 Fed. 403 (C. C. A.).

> "If the plaintiff can show the profits he claims were reasonably certain to be realized by him if the contract had been fulfilled and also that the defendant was at fault in not fulfilling the same, he may recover such reasonable profits".

Trego v. Arave, 116 Pac. 119 (Idaho);

Johnson v. Faxon, 52 N. E. 539 (Mass.);

Shoemaker v. Acker, 116 Cal. 239;

Lilly v. Lilly, 81 Pac. 852 (Wash.);

Sutton v. Wanamaker, 95 N. Y. Supp. 525.

In McConnell v. Corona City Water Co., 149 Cal. 60, an action for damages, the Court said on page 66:

> "Where the loss of profit can with reasonable certainty be shown, both as to the fact and as to the amount, such loss of profits is properly an element of damage."

In Walsh v. Standart, 174 Cal. 807, an action for breach of contract to cut and sell standing timber. Allegation of performance by plaintiff and refusal to perform by defendant. Evidence showed a continued demand by plaintiff for the proper performance of the contract. The Court said at page 812:

> "Considering the amount of timber to be cut under the contract, the testimony as to the market value of the same, and the probable profit to be made by the plaintiff, it cannot be said that the amount of damages awarded is without substantial support in the evidence".

In this case, Cotton was continually demanding delivery between Nov. 19, 1918, and Feb. 17, 1919. See: Nov. 19 (Trans. p. 82); Nov. 29 (Trans. p. 84); Dec. 2 (Trans. p. 85); Dec. 5 (Trans. p. 86); Dec. 7 (Trans. p. 87); Dec. 9 (Trans. p. 88); Dec. 11 (Trans. p. 91); Dec. 17 (Trans. p. 92); Dec. 19 (Trans. p. 93); Dec. 28 (Trans. p. 94); Jan. 6, 1919 (Trans. p. 94); Jan. 9 (Trans. p. 95); Jan. 17 (Trans. p. 97); Feb. 8 (Trans. p. 103); Feb. 17 (Trans. p. 105).

Lost profits were also allowed in the following:

Connell v. Higgins, 170 Cal. 541 at 549;
Bryson v. McCone, 121 Cal. 153 at 159;
Pac. Co. v. Packers, 138 Cal. 632 at 638;
Robinson v. Respin, 33 Cal. App. 536.

Plaintiff in error argues that no mention was made of the market in which the wax had been sold nor that the resales had been made at a profit and that therefore, defendant in error should not have recovered. We have pointed out that it was not necessary to have given such information and that sufficient information was furnished to put the seller on inquiry. Referring to the cases cited by plaintiff in error on this point (plaintiff's brief, pp. 26-28) examination of them will show that they do not conflict with the cases cited in our brief.

Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540; 47 L. Ed. 1171, went off on a question of pleading, and the Court said:

> "It does not allege the conclusion of fact so definitely that it must be assumed to be true."

In Setton v. Eberle-Allbrecht Flour Co., 258 Fed. 905, there was no allegation of special damage (as there is here) and the buyer failed to recover.

In Rohm v. Deig, 23 N. E. 141, defendant did not properly plead the loss of profits.

In Wappoo Mills v. Commercial Guano Co., 18 S. E. 308, no notice of resale was given and hence no profits allowed.

In Huggins v. S. E. Lime and Cement Co., 48 S. E. 933, the same rule was applied.

In Alabama Chemical Co. v. Geiss, 39 Southern 255, defendant failed to deliver lumber contracted for to build a factory. Held that the loss of profits in manufacturing were too remote.

In Righten v. Clark, 60 Atlantic 741, wholesale coal dealer sold to retailer. Fact that retailer bought to sell at a profit held insufficient to hold wholesaler for lost profits.

The foregoing cases do not sustain counsel's contention, while the cases which we have cited fully sustain our contention that under the facts shown in this case profits on the resale are recoverable.

> "It is not required that he must have exact knowledge or information in detail as to just what loss will result, nor is it always essential that such special conditions be mentioned in the negotiations or included in the contract in express terms. It is sufficient if they are known to the parties or are of such a character that they may be fairly supposed to have been in contemplation in the making of the contract".
>
> 8 Ruling Case Law, p. 461 (and cases there cited).

Point III.

IT WAS NOT THE DUTY OF COTTON & COMPANY TO PURCHASE IN THE OPEN MARKET WHEN OZMO FAILED TO DELIVER THE WAX BECAUSE OZMO NEVER NOTIFIED COTTON THAT IT COULD NOT OR WOULD NOT DELIVER IT.

Cotton testified, "Ozmo had promised us continuously that they would make delivery" (Trans. p. 39). "Their attitude at all times was they would make delivery as soon as they could get it and they kept promising us that we could expect delivery in a short time, sometimes they said we will be able to deliver on stipulated date" (Trans. p. 40).

"Q. Did you attempt to buy any of this wax on the market?

A. We made enquiry but did not dare make purchases in view of the fact that they insisted they were going to compel us to take delivery of this wax which they claimed all the time they could furnish" (Trans. p. 40).

Ozmo wired November 21, "Will notify you of shipment" (Trans. p. 83); November 30, "Will ship last of December" (Trans. p. 85); December 7, "Shipment will be made on or before December 23" (Trans. p. 87); December 9 "Give us shipping instructions" (Trans. p. 90); December 19 "Wax will leave refinery about December 28" (Trans. p. 94); "January shipment will be made between January 20th and 30th" (Trans. p. 94); January 7, 1919 (Trans. p. 95); January 13 (Trans. p. 96), January 14, "By February 15 we will be prepared to ship

you the white wax" (Trans. p. 97); January 16 (Trans. p. 97); January 20 (Trans. p. 98); January 22 (Trans. p. 99); January 30, "We are advised that the Utah Oil Refining Co. can positively ship before January 31st" (Trans. p. 100); February 5, "Utah have 30 tons loaded, can furnish balance as per our wire January 30th" (Trans. p. 101); February 17 (Trans. p. 105).

Ozmo from November 21, 1918, to February 17, 1919, were continually advising Cotton that the wax would be shipped. Naturally Cotton was afraid to go into the market and buy, since Ozmo was insisting on its ability and willingness to fill the contract. Under these circumstances Cotton was under no legal obligation to buy in the open market. *Until Ozmo refused to deliver, Cotton was not bound to buy.*

> "A party who grounds his complaint on an allegation that the other party was at fault in confiding in his representatives and promises is not entitled to much favor and the burden is upon him to show, at least, from what time the other should have abandoned his faith and set about retrieving his error and minimizing the damages".
>
> Kentucky Dist. Co. v. Lillard, 160 Fed. 34 at 40 (C. C. A.).

> "The repeated promises made by plaintiff, and the reliance of defendants upon those promises, have resulted in enlarging the injury they have suffered beyond the probable loss if they had disregarded such promises and taken a different course to save themselves. That the defendants should now have their complaint dismissed be-

cause the damages suffered are greater than they would have been if defendants had not credulously accepted the assurances of plaintiff itself would be a crying injustice".

Lillard v. Kentucky, 134 Fed. 168 at 179 (C. C. A.);

Howard Supply Co. v. Wells, 176 Fed. 512 (C. C. A.);

Campfield v. Sauer, 189 Fed. 576 at 580 (C. C. A.).

Cotton accepted the assurances of Ozmo that it would deliver the wax and now Ozmo says we should not have relied on their promises. Such a plea is entitled to no consideration in this Court.

In Benton v. Fay, 64 Ill. 417, defendant failed to furnish a machine and it was held that the vendee could hold the vendor liable for so long a time as was reasonably necessary to supply himself with another machine of similar character, *after being advised of the defendant's refusal to send the machine sold to him.*

"Before defendant in an action for breach of contract for the sale and delivery of lumber of a particular kind for which there is no market at the time and place of delivery, can be allowed to show that lumber of that kind might have been obtained by the plaintiff at other places, it must show not only that lumber of that particular kind could have been obtained but also that *plaintiff had sufficient time after notice that defendant would not deliver the lumber and before the time specified for its delivery to purchase the same and get it to the place where delivery was to be made,* and evi-

> dence that such lumber could have been procured at other places in the absence of such showing is inadmissible."
>
> Cockburn v. Ashland L. Co., 12 N. W. 49 (Wis.).

Delivery was to be made to Mitsui and Co. in November and December, 1918 (Trans. p. 109) and to the Standard Oil Co. each month beginning January, 1919 (Trans. pp. 36-38). No deliveries were ever made.

Referring to the cases cited by plaintiff on this point in his brief, pages 29 and 30:

In Creve Coeur Lake Ice Co. v. Tamm, 90 Mo. App. 189; seller refused to deliver ice on contract and buyer bought it in open market and was allowed damages.

In Armeny v. Madson & Buck Co., 111 Ill. App. 621, contract for pens. Held duty of buyer to purchase in open market when seller failed to deliver, but he could not obtain them and was allowed profits. Court said at page 624:

> "Appellants knew when they sold the pens to appellee that it was its intention to sell them again and at a profit. That is what it was in business for and the object for which it bought them. Appellants must therefore be regarded as having contemplated resales by appellee at a profit".

In Consolidated Coal Co. v. Mexico Fire Brick Co., 66 Mo. Appeals, 296. Coal contract. Sellers were unable to procure cars. Held duty of buyer to purchase coal in open market.

In Kinports v. Breon, 44 Atlantic, 436, there was no element of lost profits and the usual rule of damages applied.

Plaintiff in error has failed to cite a single case where the seller was insisting on his ability to deliver.

They are all cases where the seller had refused or was unable to deliver. We contend that the rule in our case does not apply because *until Ozmo refused to deliver, Cotton was under no duty to buy in the open market.* Further, Ozmo kept promising delivery from November to February, and is estopped by such acts in saying that Cotton should have bought in the open market.

A vendee is not bound to go into the market and procure other goods until the vendor has given him notice that he will not fulfill the contract.

When a refusal to perform is a wrong, he has a right to expect that when the time comes a wrong will not be done.

2 Sutherland on Damages, 4th Ed., p. 2289.

In Shouse v. Neiswaanger, 18 Mo. App. 236, at 250, the Court said,

> "We find no proof that the plaintiff had any notice that the defendant would not perform its contract until it made default—until they have notice to the contrary the plaintiff might well rely on the contract with the defendant to obtain the deals."

Point IV.

THERE ARE NO EXCEPTIONS IN THE BILL OF EXCEPTIONS. EXCEPTIONS TAKEN SUBSEQUENT TO THE TRIAL ARE TOO LATE. THEY MUST BE TAKEN AT THE TRIAL BEFORE THE CASE IS FINALLY SUBMITTED SO THAT THE TRIAL JUDGE'S ATTENTION IS CALLED TO THE ERROR AND HE IS GIVEN AN OPPORTUNITY TO CORRECT IT.

> "The findings as made must stand if there is any substantial evidence to sustain them; and whether there was such evidence could be made reviewable on writ of error only by presenting a request to the trial court, either to make some declaration that there was no evidence to support a finding adverse to the party making the request or to render a judgment in his favor on the ground that there was no such evidence and upon refusal of the court so to do, *taking proper exception* and assigning error thereon. There having been no request in this case for any such declaration of law in any form and *no exception taken* or error assigned to the court's action, therefore the findings of facts, even if it was such, cannot be challenged".
>
> Gibson v. Luther, 196 Fed. 203;
>
> Felker v. Bank, 196 Fed. 200.

It must be shown from the record that the party objected at the trial to the rulings and *had the exception noted* and reduced to a bill and that the party persisted in them.

> Mexico Intl. Co. v. Larkin, 195 Fed. 495;
>
> Northern Idaho & Mont. P. Co. v. A. L. Jordan, 262 Fed. 765 (9th C. C. A., Gilbert, J.).

Point V.

PLAINTIFF IN ERROR IS MERELY ATTACKING FINDINGS OF FACT MADE BY THE COURT BELOW. THESE ARE AS FOLLOWS:

a. That the contract was not made on October 14, 1918, as found by the Court but on August 30, 1918.

b. That the notice of resale was insufficient to bring into play the rule of loss of profits as damages.

c. That upon the failure of Ozmo to deliver the wax, it was the duty of Cotton to minimize the damages by purchasing wax in the open market.

a. The Court found that the contract was made on October 14, 1918. The evidence on this point is as follows:

Cotton's testimony: "We received the contract in its final form, October 14, 1918" (Trans. p. 41).

Cotton to Ozmo October 12, 1918: "We have since received the contract" (Trans. p. 82).

Leon's testimony: "There was an agreement drawn up in writing and which was submitted to us and modified by Ozmo before we had signed it. The original was returned to them, was rewritten and a new contract submitted" (Trans. p. 60). "Ozmo forwarded a contract which they themselves had not signed, making no mention of a letter of credit and we made minor corrections with reference to the quantity, eliminating the vagueness of quantity mentioned, and then returned it to them

and then received their demand for a letter of credit" (Trans p. 63).

Letter of Ozmo to Cotton October 10, 1918, explaining delay in execution of contract: "Therefore we drew new contract, etc." (Trans. pp. 77- 78- 79).

b. Objection that the notice was insufficient.

The Court found "That prior to the execution and delivery of said agreement—defendant knew that plaintiff was about to purchase the wax—for resale and had resold the same" (Trans. p. 20).

The evidence of such notice: Leon told Ozmo's brokers (Trans. p. 58, last line, and p. 59). Letters and telegrams, Cotton to Ozmo set forth on page ..... of this brief and set forth at pages 69- 72- 73 of the transcript. It will be seen from the foregoing that there was some evidence to sustain the findings and our contention is that these findings of fact cannot be disturbed.

> "When a case is tried by the court without a jury, its findings on questions of fact are conclusive, altho open to the contention that there was no evidence on which they could be based. The question remains whether or not the facts found are sufficient to support the judgment and *rulings to which exceptions are duly reserved* may be reviewed".
>
> Ward v. Joslin, 186 U. S. 142 at 147; 46 L. Ed. 1093.

> "Where the case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that

upon the evidence the findings should have been different".

Dooley v. Pease, 180 U. S. 126 at 131; 45 L. Ed. 457;

Stanley v. Albany Co., Supr., 120 U. S. 547; 30 L. Ed. 1002.

"Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals or by this court, if there was any evidence upon which such findings could be made".

Dooley v. Pease, 180 U. S. 126;

Hathaway v. First Natl. Bank, 134 U. S. 494; 33 L. Ed. 1004;

Runkle v. Burnham, 153 U. S. 216; 38 L. Ed. 694.

CONCLUSION.

The Court below found, upon the evidence submitted:

That the contract of purchase was made October 14, 1918.

That the seller was notified prior to October 14th that the wax had been resold.

That the defendant in error was under no duty to buy in the open market—because Ozmo never notified it that it would not fulfill the contract.

It appears that there are no exceptions in the record.

It is respectfully submitted that the judgment be affirmed.

Dated, San Francisco,
October 17, 1921.

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